No. 91-535

In The

Supreme Court of the United States

October Term, 1991

ALAN B. BURDICK,

Petitioner,

v.

MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii, BENJAMIN CAYETANO, in his capacity as Lieutenant Governor of the State of Hawaii,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR ANDRE MARROU, LENORA B. FULANI, AND THE COALITION FOR FREE & OPEN ELECTIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

JAMES C. LINGER
1710 S. Boston Ave.
Tulsa, OK 74119
(918) 585-2797
Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSENT TO FILING BRIEF AMICUS CURIAE

All parties to the instant cause have consented to the filing of this brief of the Amicus Curiae as evidenced by the filing of the Consent to Filing of Brief Amicus Curiae herein.

INTEREST OF THE AMICI

Amici Andre Marrou and Lenora B. Fulani are candidates for president in the election of November, 1992, and both candidates have some supporters in every state in the nation. Marrou is the presidential candidate of the Libertarian Party. Fulani expects to receive the presidential nomination of the New Alliance Party and several other parties. Both Marrou and Fulani will strive to qualify for the ballot of all states, but chances are that one or both of them will fail to qualify in at least a few states. In such states, both candidates have an interest in at least receiving write-in votes from supporters.

Amicus Coalition for Free & Open Elections (COFOE) is an unincorporated association of organizations and individuals, formed in 1985, to work for full and fair access to the electoral process. The Coalition includes political parties which run candidates for all levels of public office.

I. SUMMARY OF ARGUMENT

Even if Hawaii has a valid interest in prohibiting all write-in votes for office other than president, Hawaii has no valid interest in prohibiting write-in votes for presidential candidates in general elections. A ban on write-in

votes for president in Hawaii, and other states, is particularly harmful to the voting process. Third party and independent candidates almost invariably are on the ballot in some states, but not other states; and a write-in ban for president prevents such national candidates from receiving votes from *some* of the voters who wish to vote for them.

II. ARGUMENT

In *Anderson v Celebrezze*, 460 U.S. 780, this Court held that "the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson*, at p. 795.

Hawaii has offered no state interest whatsoever in prohibiting write-in votes for president at general elections. The Ninth Circuit did not mention the issue of write-in votes for presidential candidates, yet its endorsement of the Hawaii ban on write-in votes is so sweeping, there is little doubt that the ban on presidential write-ins will stand, unless this Court reverses it.

Third party and independent presidential candidates almost invariably get on the ballot in some states, but not all states. According to *Statistics of the Presidential & Congressional Election of* (Year), a booklet published by the Clerk of the U.S. House of Representatives following each presidential election, the only third party or independent presidential candidates who have appeared on the ballot in all jurisdictions which elect presidential electors, since

1916, have been Ed Clark (Libertarian presidential candidate in 1980), John B. Anderson (Independent presidential candidate in 1980), and Lenora B. Fulani (New Alliance presidential candidate in 1988)

Even major party presidential candidates sometimes fail to get on the general election ballot of certain states. In 1912, Republican nominee (and the incumbent president) William Howard Taft was not on the November ballot in California or South Dakota. In 1948, Harry Truman, Democratic nominee and the incumbent president, was not on the November ballot in Alabama. In 1964, Lyndon B. Johnson, Democratic nominee and the incumbent president, was not on the November ballot in Alabama. See *Statistics of the Presidential & Congressional Election* for 1912, 1948, and America at the Polls 1920-1964, by Richard M. Scammon.

When a presidential candidate in the general election is not on the ballot of a particular state, and that state does not even permit write-in votes, that presidential candidate cannot receive votes from some of his supporters. This not only harms the presidential candidate, and the voters who were deprived of an opportunity to vote for him; it also harms the voters who did vote for that presidential candidate in other states, since their votes are diluted.

Hawaii ballot access procedures for third party and independent presidential candidates requires a petition signed by 1% of the last vote cast in the state, now approximately 4,000 signatures. Hawaii argues that this is lenient. It may be relatively lenient, but it is sufficiently

difficult to have kept some of the third party and independent presidential candidates with relatively high support in recent elections from appearing on the Hawaii ballot. Even relatively lenient petition procedures sometimes prevent candidates from qualifying and – more importantly – totally disenfranchises their supporters from voting for them in states which ban write-in voting.

There were no government-printed ballots in state or federal elections in the U.S. until 1888. Prior to that time, voters could prepare their own ballots. The first recording of write-in votes for president, after the existence of the government-printed ballot created the possibility of such votes, was in 1912. In California, voters who wished to vote for William Howard Taft, the Republican nominee, had to write in a full slate of presidential electors pledged to Taft. Only 3,914 voters cast such a vote (approximately one-half of 1% of the number of votes cast in California for president).

To overcome the problem that voters who wished to cast a write-in vote for president were forced to the cumbersome task of writing in a full slate of presidential electors, California hit upon the idea that a write-in candidate for president should file a declaration of candidacy at least a few days in advance of the November election, with an enclosed slate of presidential elector candidates pledged to him. Then, the voter could cast a write-in vote for that presidential candidate, and such write-in votes would be deemed to be cast for the slate of electoral candidates on file pledged to that candidate (by analogy, all states now provide that votes cast for presidential candidates listed on the ballot are really deemed

to be votes for a slate of electors pledged to that presidential candidate; no state any longer provides that voters vote directly for individual elector candidates).

Since then, other states have adopted the idea. When courts have ruled that states must provide a chance for voters to cast write-in votes for president, they have always included the idea in the relief. See *Socialist Labor Party v Rhodes*, 290 F.Supp 983 (S.D. Ohio, 1968), *Kamins v Board of Elections of the District of Columbia*, 324 A 2d 187 (D.C., 1974), *Munn v Michigan Secretary of State*, unreported, no.51041 (Mich. Supreme Court, 1964) and *Paul v State of Indiana Election Board*, 743 F.Supp 616 (S.D. Ind., 1990).

Respondents have never even discussed the issue of write-ins for president in general elections. In the apparent absence of any state interest in a ban on write-in votes for president, this Court should reverse the Ninth Circuit and rule that the First and Fourteenth Amendments to the U.S. Constitution protect a voter's right to vote for the candidate of his or her choice, for president, whether that candidate has gained a place on the ballot or not.

Respectfully submitted,

James C. Linger
1710 S. Boston Ave.
Tulsa, OK 74119
(918) 585-2797
Counsel for Amici Curiae